

STATE OF INDIANA)
) SS:
 COUNTY OF MONROE) CAUSE NO.: 53C06-0310-PL-1888

DEPARTMENT OF FINANCIAL INSTITUTIONS)
 AND ATTORNEY GENERAL OF INDIANA,)
 Plaintiffs,)

v.)

CASH-CONNECTS.COM, INC., d/b/a)
 CASH-CONNECTS.COM,)
 Defendant.)

PRELIMINARY INJUNCTION

This matter came to be heard on the 17th day of February, 2004 upon the Plaintiffs' Complaint for Preliminary Injunction, file-stamped October 30, 2003, and Plaintiff's Amended Verified Complaint, file-stamped November 16, 2003. Plaintiffs appeared by Melinda C. Frick and Michael T. Schaefer, Deputies Attorney General and Defendant appeared in person by John Martinez, Managing Director and Owner, and by counsel of record, Gary Price and David Klinestiver. At the hearing, record was waived, testimony was heard, evidence introduced, and the Court, having had these matters under advisement now finds the following:

I. FINDINGS OF FACT

1. At the hearing, the parties claimed this to be a case of first impression in Indiana; pursuant to Exhibit 1, the court takes notice that this case is one of nine lawsuits filed by Plaintiffs across the State of Indiana against companies offering rebates in conjunction with the sale of Internet access or Internet membership services; furthermore, the

defendant reported that four of Plaintiff's requests for injunctive relief were denied, that one was granted and another remains pending.

2. Defendant was incorporated in the State of Nevada on December 18, 2002 and registered to do business in the State of Indiana on April 3, 2003. Exhibit C.

3. Defendant conducts its business from retail outlets at 3822 W. 3rd Street, Bloomington, Indiana 47404; 7610 S. Shelby Rd., Indianapolis, Indiana 46227; 7436 Rockville Road, Indianapolis, IN 46214; 7826 N. Michigan Road, Indianapolis, IN; 9506 Haver Way, Indianapolis, IN 46240; 3701 N. Post Road, Indianapolis, IN 46236; 8239 E. Washington St., Indianapolis, IN; 3740 Lafayette Road, Suite 6, Indianapolis, IN 46222; 703 N. Lebanon St., Lebanon, IN 46052; and 121 N. Washington St., Kokomo, IN 46901; and 3416 St. Rd. 38 E., Suite B, Lafayette, IN.

4. The Indiana General Assembly has charged the Indiana Department of Financial Institutions ("DFI") with the administration of the Uniform Consumer Credit Code ("IUCCC"). Ind. Code § 24-4.5-6-103.

5. J. Philip Goddard ("Goddard"), the Deputy Director and Chief Counsel to the DFI, testified that the original IUCCC did not envision the payday loan for consumers who are in need of emergency cash. Thereafter the case *Livingston v. Fash Cash USA, Inc*, 753 N.E.2d 572 (Ind. 2001) was decided which determined that payday loan companies could not collect finance charges in excess of 36%;

6. This new Statute that is referred to as the Small Loan Act or the Payday Loan Act allows a licensed loan company to offer emergency cash on a temporary basis, but it has caps on the interest rate that may be charged by the loan company at a maximum of \$35. The Small Loan Statute also has in place protections for the consumers from

companies who choose to disguise their loans or apply subterfuge for the purpose of avoiding regulation by this chapter. Ind. Code § 24-4.5-7-102(2). Furthermore, the Small Loan Statute prohibits lenders from the following:

A lender making small loans shall not commit nor cause to be committed any of the following acts:

- (f) Using a device or agreement that would have the effect of charging or collecting more fees, charges, or interest than allowed by this chapter, including, but not limited to:
 - (i) entering a different type of transaction with the consumer;
 - (ii) entering into a sales/leaseback arrangement;
 - (iii) catalog sales; or
 - (iv) entering any other transaction with the consumer that is designed to evade the applicability of this chapter.

II. Engaging in unfair, deceptive, or fraudulent practices in the making or collecting of a small loan

Ind. Code § 24-4.5-7-410(f) and (g).

7. After several consumer complaints with DFI and in an effort to protect consumers under the IUCCC, the DFI launched an investigation into what they view as an emerging internet rebate membership scheme that had started in Indiana after the enactment of the Small Loan Statute on March 14, 2002. Goddard testified at the hearing that the Small Loan Statute was designed to establish a law with reasonable rates, reasonable charges, and with protection for consumers. Goddard explained the definition of the small loan for the amounts ranging from \$50 to less than \$401, and that loans for more than \$401 are be subject to the IUCCC if the loan is for personal, home, or family needs.

8. Goddard testified that during DFI's investigation of Cash-Connects.Com's business practices, they came to believe that Cash-Connects.Com and several other

companies were making small loans at usurious interest rates to consumers under the pretense that they were selling an internet rebate membership.

9. Goddard testified that he personally attempted to determine the ownership of the Cash-Connects.Com stores, but no employee, including the agent of record on the Articles of Incorporation, Lawrence Frutkin, would disclose the ownership information of this company to DFI.

10. Goddard further testified that Mr. Jeffrey Farren ("Farren"), the prior owner of the payday loan operations Lone Star and Cash Quick (the numerous premises of which were leased to the owner of Cash-Connects.Com), would also not disclose who the owner of Cash-Connects.Com was so that DFI could discuss their concerns about this loan operation.

11. Goddard stated that he and his investigative staff proceeded to investigate the Cash-Connects.Com business operation through telephone conversations with employees, through conversations with consumers who had lodged complaints against this company, through review of the Cash-Connects.Com website, and through review of the contracts used by Cash-Connects.Com. Goddard personally visited the Cash-Connects.Com store on 82nd Street in Indianapolis as a part of DFI's investigation. Goddard asked the employee if he could get a loan. The employee responded affirmatively and explained that the amount available is based upon his financial situation. The employee requested his bank statement, drivers license, check stub, and a blank check.

12. Based upon DFI's investigation, Goddard testified the DFI Board unanimously determined that Cash-Connects.Com was in the business of loaning money to consumers at an illegally high rate and without a license, all of which is in violation of the IUCCC.

Goddard further testified that the internet membership offered by Cash-Connects.Com has no monetary value because he could find no consumer who wanted the internet membership.

13. The DFI has determined that Cash-Connects.Com, as well as some other small loan companies, are in violation of the IUCCC, and DFI sought civil enforcement through the Office of the Attorney General. Testimony of J. Philip Goddard; Exhibit 1.

14. Goddard testified that loan companies operating under the pretense of being an internet rebate membership are merely a ruse to avoid governmental oversight and regulation and that these companies are a danger to consumers who find themselves in need of emergency cash.

15. Goddard explained that consumers are harmed by being pushed onto a debt treadmill where they may never get relief. He explained that based on studies and the Department's observations, these types of practices can lead consumers on a downhill slide to the filing of bankruptcy, having marital problems, or causing consumers to not be able to pay their car loans or other necessary bills because they cannot possibly pay back the debt at the extraordinarily high interest rates charged by Cash-Connects.Com.

16. Goddard stated that there are more than 40 licensed payday loan-lending institutions in Indiana that operate in compliance with the IUCCC.

17. The defense presented evidence in contravention of the Plaintiff's claims primarily through John Martinez ("Martinez"), Managing Director and owner of Cash-Connects.Com, who testified that he opened these retail locations in Indiana after establishing a similar business in his home state of Texas approximately five years ago. Martinez testified that Marpast of Texas, Inc., in which he is an owner, operates in Texas

using substantially the same business model as that of Cash-Connects.Com. Martinez testified that Marpast of Texas had been the subject of an inquiry by the Texas Consumer Credit Commission and that, after Martinez sent that commission a letter explaining the business model, no further inquiry or action was taken by that regulatory authority. Testimony of J. Martinez.

18. Martinez selected Indiana for expansion of his retail operations after meeting Farren, then the operator of a payday loan business in Indiana with over twenty locations throughout the State. According to Martinez, Farren was seeking to close his payday loan operations in Indiana, and Martinez was thus able to acquire approximately half of the leaseholds of Farren's payday loan company, together with some furniture, equipment, customer information and other assets of that business. *Id.*

19. Martinez hired a number of the employees then working at these payday loan facilities to be customer service representatives ("CSR's") for Cash-Connects.Com. In addition, Farren introduced Martinez to Sue Murphy ("Murphy"), a business acquaintance with experience in the payday lending business, whom Martinez hired to be Cash-Connects.Com's General Manager. *Id.*; Testimony of S. Murphy and R. VanMeter.

20. Martinez testified that he acquired these assets of Farren's payday loan business because it permitted Cash-Connects.Com to quickly and relatively inexpensively establish a retail presence in Indiana at locations with a proven track record of customer activity and with experienced employees.

21. Despite Goddard and the DFI concluding that the Defendant's internet services have little or no value, the defense presented evidence that Cash-Connects.Com is not an ISP, but rather offers for sale a series of memberships for access to online services and

content available through Cash-Connects.Com's proprietary website, and that the price of these memberships increases with increasing levels of services and content available to the purchaser. Exhibits I and 17.

22. Martinez testified that the services and content currently available to members through the Cash-Connects.Com website include an email account, news and weather information, stock quotes, games, online "personals" listings, and sports information including sports picks (also known as "touts") for a variety of professional and collegiate sports. Exhibits 4, 17 and 20; testimony of J. Martinez.

23. Although some of the online services and content offered through the Cash-Connects.Com website are available at no charge to anyone with access to the Internet, Martinez believes there is value added by conveniently bundling these features with "premium" services and content generally available online only at a charge to the consumer. Testimony of J. Martinez.

24. The premium elements of the Cash-Connects.Com website include the online personals and sports picks for one or more sports leagues. To date, Martinez testified that Cash-Connects.Com has paid a total of \$180,000 in licensing fees for access to the premium services and content made available to Cash-Connects.Com's members. *Id.*

25. The range of sports picks available to Cash-Connects.Com's members varies according to the membership level they have purchased. Martinez believes the services fees paid by its members for this and other premium content available through the Cash-Connects.Com website are competitive with prices charged for similar content offered on other websites. *Id.*

26. Evidence was presented that other Internet websites offer a variety of different sports picks packages in a wide range of prices, including \$10 per day for arena football picks, \$110 for seven days of NBA picks, and \$999 for one year of "all sports" picks. Exhibits 18 and 19.

27. A Cash-Connects.Com membership providing access to these services may be purchased by the day, the week or for a term of one year. Testimony of J. Martinez.

28. Consumers who purchase a one-year membership from a Cash-Connects.Com retail location may currently be eligible to receive a cash rebate at the time of purchase. The amount of the rebate varies with the level of membership. For example, purchasers of a one-year "Bronze Level" membership, with a per diem fee of \$2.00 per day, may elect to receive a \$100 rebate; purchasers of a one-year "Gold Level" membership, with a per diem charge of \$6.00 per day, may receive a \$300 rebate. *Id.*; testimony of R. VanMeter; Exhibit I.

29. The Defendant markets its memberships, including its rebate-eligible one-year memberships, from eleven retail locations in Indiana, all of which are leasehold properties formerly housing "payday loan" businesses. Testimony of J. Martinez.

30. Plaintiff argued that although none of Defendant's locations advertise Internet content access on their storefronts, the Defendant purports to sell Internet services to consumers from the described locations. The advertising appearing on many of Defendant's storefronts exclusively promotes the availability of cash. Exhibits E and F.

31. But the Defendant introduced evidence showing a smaller sign than most store front signs posted on the front door of its Bloomington office informing customers that

“Cash-Connects.Com does not offer check cashing, money order, or payday loan services.”

Exhibits 6 and 7.

32. Any messages or posters describing other services offered by Cash-Connects.Com, such as Internet services, are generally relegated and confined to the interior of the Defendant’s stores and generally are not visible from the street by the traveling public. Exhibits 8 through 16. A poster at the inside of the door at the 8239 E. Washington St., Indianapolis location promotes its business as “the Loan Arranger.” Exhibit E.

33. When consumers call the Defendant’s telephone number that is posted on their website, (317) 357-2274, they hear the following message:

Thank you for calling Cash-Connects.Com, the most convenient and flexible way to get instant cash. The best way to contact us is on the internet. Our internet address is www.Cash-Connects.Com. That’s c-a-s-h-hyphen-c-o-n-n-e-c-t-s.com. If you are calling to receive instant cash by phone or to make a payment by phone, please press “1” to be immediately connected to our call center. If you would like to be directly connected to our Castleton office where you may obtain instant cash and handle your account in person, please press “2” to be connected to the Castleton office. Thank you for calling Cash-Connects.Com.

Exhibit D.

34. The foregoing message says nothing about receiving Internet services, only cash.

35. The evidence was conflicting as to the business practices of Cash-Connects.Com regarding the sale of memberships. Some of the consumer witnesses stated that Cash-Connects.Com’s Customer Service Representatives (“CSR”) did not discuss with them, or that they did not recall any discussion regarding, the website services, the terms and conditions of the membership they were purchasing, or the financial responsibilities attaching to those memberships. Regina VanMeter (“VanMeter”), a former

CSR in Bloomington and now a supervisor for Cash-Connects.Com, testified that Cash-Connects.Com's CSRs are trained and instructed to review with each new member the material terms of their Membership Agreement, and are shown how to access and log-on to the Cash-Connects.Com website on a computer. VanMeter further stated that she personally reviewed this information with one of these consumer witnesses, Mr. Joshua Held. Testimony of J. Held, K. Williamson, A. Miller and R. VanMeter.

36. When a consumer enters one of defendant's stores, the store's CSR obtains financial information from the consumer, including the following: bank account number from a current bank statement, address, photo identification, employer telephone number, a copy of a voided personal check, and a paycheck stub. Testimony of R. Van Meter.

37. Based on that information, the CSR then determines the level of membership and the amount of rebate for which the consumer becomes eligible. *Id.* Van Meter made no mention of consumers actually determining their membership level choice based upon desired content.

38. The clear intent for establishing the financial status of the consumer by the Defendant is to be assured that the consumer will be able to pay back the money received by the consumer from the defendant. *Id.*

39. Consumer witnesses testified that they entered Defendant's stores to obtain of money, not Internet services. Testimony of J. Held, K. Williamson, E. Frazier, A. Elliott, and A. Miller.

40. Consumer Amy Miller testified that she was not aware that the money she had obtained from Cash-Connects.Com qualified her for what is referred to by Cash-

Connects.Com as a "Gold Member" level of membership to their website until attending the hearing on February 17, 2004.

41. Joshua Held testified that he had previously received a loan from a payday loan company called Lone Star that was located in Bloomington. When he needed another loan, Held went to the same address, but found that it was now called Cash-Connects.Com. Held described the location as looking the same as it had when it was Lone Star; it had the same logos on the wall.

42. As an Information Technology ("IT") employee at Baxter Healthcare, Held had no need or desire for any Internet services and entered the store strictly for a loan. After application, he was told he was eligible for \$500, which he accepted. Although he signed a contract, he understood that \$100 of each of five \$140 biweekly payments to Cash-Connects.Com was to retire the \$500 loan and \$40 was to pay the interest. After five payments, Cash-Connects.Com continued to debit Held's bank account. Held has paid \$1200 towards the \$500 loan he received from Cash-Connects.Com.

43. Held, trained as an IT professional, also testified that the services provided by the Cash-Connects.Com website offered only "hyperlinks" to other websites such as the Weather Channel and the Fox News Channel that are available on any browser free of charge. Exhibit 17. Held already had DSL internet service for 10 percent of what the Cash-Connects.Com website charges. Held was also able to access defendant's website services without using a password.

44. Kathy Williamson testified that she had previously received a \$300 payday loan

from Cash Quick in February of 2003 for which she left a post-dated check in the amount of \$335. After two weeks, Cash Quick deposited the post-dated check, and she had no further dealings with Cash Quick.

45. Because of another financial emergency, Williamson later returned to the same location, 9506 Haver Way, Indianapolis, for another loan and was told that it was now called Cash-Connections. Testimony of K. Williamson.

46. On the second visit, Williamson spoke with an employee by the name of "Jessica" who gave her the Cash-Connects.Com company business card. Exhibit H. Under the website address on the front of the business card, the telephone number is listed as 317-357-CASH. The other side also states: "Payday loan coming due? WE CAN HELP!"

47. This employee told Williamson that the company was under new management and no longer accepted checks, but they do an automatic checking withdrawal. After application and providing information on her financial status, Williamson was told that she could qualify for more than \$300 but Williamson said she only needed \$300. The employee further explained to Williamson, and she wrote it on the business card, that the amount that she would have to repay for the loan was \$367.50. After the transaction was completed, the employee told Williamson that they also offer website internet service, but Williamson said she was not interested in the web service.

48. Although she signed a contract and also an automated clearing house ("ACH") authorization, Cash-Connects.Com would not send her a copy of the contract when she requested it on a later date when her checking continued to be debited for amounts totaling in excess of the \$367.50. Williamson contacted Cash-Connects.Com about the overpayments and was told by an employee that she did not read the fine print in the

contract and must continue to pay because she had signed a one-year contract. So Cash-Connects.Com continued to deduct up to a total of \$1249 from Williamson's checking account until she closed it.

49. Williamson stated that she was harmed by Cash-Connects.Com because it caused her account to be without sufficient funds to pay her automatic debits for her car payment, her educational loan payments to Ball State University and that her check written to Marsh Grocery bounced, resulting in her losing her check-cashing privileges. Additionally, attempts to resolve these issues with Cash-Connects.Com caused Williamson to miss work, compromising care delivery to the clients she treats in her position as a Behavioral Consultant for the Bureau of Developmental Disability Services.

50. Eugene Frazier went to Cash-Connects.Com for a loan in October 2003. Frazier told the employee that he wanted a \$300 loan and the employee had him fill out an application, give a bank statement, driver's license, pay stub, and work telephone number. The employee told Frazier that he qualified for \$400, so he accepted the \$400. Frazier stated that the employee never mentioned the internet service, and that he had not heard about the internet service until sitting in Court on February 17, 2004. Cash-Connects.Com began debiting Frazier's account \$112 every two weeks beginning in October. On February 9, 2004, Cash-Connects.Com debited his account for a total of \$690. Frazier was left without sufficient funds to pay his daughter's court-ordered educational support, his car payment or his household bills such as gas and electricity. Testimony of E. Frazier.

51. Anita Elliott also testified that she visited a Cash-Connects.Com location for the purpose of obtaining a loan. This store location was previously occupied by Cash Quick where Elliott had obtained a payday loan. Elliott was told that her financial

information was still on file, and that she would no longer have to come into the office for extensions, but that it could all be done over the Internet. Elliott received a loan in the amount of \$300 and believed that her payments would be in the amount of \$44 until the loan was paid off. Elliott became alarmed when checks she had written to other creditors were bouncing and found out that it was because Cash-Connects.Com was deducting payments under the ACH that she had given the company. Even Elliott's child support money that was a direct deposit into her checking account was debited by Cash-Connects.Com. When Elliott contacted Cash-Connects.Com to determine why they were continuing to debit her account, Cash-Connects.Com told her that if she wanted to terminate the contract, she would have to pay an additional \$790. From August 2003 to January 2004, \$1124 had been deducted on her original \$300 loan.

52. Sworn declarations of seven consumers were admitted into evidence. Exhibit A in seven parts. Each of the consumers went to Cash-Connects.Com for money, not Internet service. Four of the seven consumers had received a payday loan from the prior occupant of the Cash-Connects.Com locations, either Cash Quick or Lone Star. Exhibit A, part 1, 2, 3, 4. Joseph Zakutanksy actually had his Cash Quick loan renewed by Cash-Connects.Com at the Haver Way location. *Id.*, Part 1, ¶¶ 3, 4, 5. The financial records of three of the consumers who did business with Cash Quick or Lone Star were still on file at the Cash-Connects.Com location when they applied for a loan. *Id.*, Part 1, 3, and 6.

53. The declarations of the consumers establish that they paid the following amount to Cash-Connects.Com for the money received: Zakutanksy - \$842 on \$400; Amy Miller - \$1200 on \$300; Kimberly Frazier - \$900 on \$300; Eugene Frazier - \$1026 on \$400; Judy Irwin - \$600 on \$200; Anita Elliott - \$890 on \$300; and Lezlie Hodge - \$628 on \$400.

54. The defense noted that there was no evidence that Cash-Connects.Com routinely collected, held, and cashed post-dated checks. The only record evidence is that Cash-Connects would request a customer check with "void" written across its face in order to verify the bank routing number of the potential customer. Exhibit 3.

55. In his testimony, Held acknowledged that he had made "a few assumptions" about the terms of his Cash-Connects.Com membership that "turned out to be wrong" and that he did not read his Membership Agreement until several weeks after he purchased his membership and had received a rebate.

56. The testimony of Held and the other consumer witnesses presented by Plaintiffs indicates these individuals mistakenly believed that their Cash-Connects.Com service fees were paying down a loan, notwithstanding that Cash-Connects.Com's standardized Membership Agreement neither refers to a "loan" or states that the service fees due under the agreement would be credited against repayment of a rebate or "loan." *Id.*; Testimony of J. Held, K. Williamson, E. Frazier, A. Elliott and A. Miller; Exhibit 20.

57. It is clear to the Court that the consumer witnesses did not read, or understand the terms and conditions of, the agreements they signed, and incurred economic loss in excess of any amount they believed they had bargained for.

58. In each of these cases, the defense argued that the members had continued to pay, in varying increments, substantially past the time frame when each testified they had expected the "loan" to be paid-off. None of these witnesses exercised the remedies available to them under their Membership Agreement.

59. Each consumer witness identified their execution of a written Membership Agreement, requiring signature in at least two places. There was no evidence presented

that any of these witnesses suffered from any learning or reading impairment. In fact, one witness was a graduate student with a 3.94 grade average, and another had two years of training in computer science and worked in the computer field. All consumer witnesses were or have been gainfully employed.

60. Examples of the Membership Agreements admitted in evidence are clear and unambiguous as to the essential business terms of a membership. Information regarding early termination of a one-year membership is printed in boldface capital lettering on the first page of the contract, and specifies an "Early Termination Fee" to be paid should the member elect to terminate his or her membership. Exhibits 3, 4, 20, 22.

61. The Early Termination Fee was added to Cash-Connects.Com's standard form of Membership Agreement beginning about April 2003. Earlier agreements provided for a member to "reimburse" Cash-Connects.Com for the full amount of any rebate received if that member elected to terminate a one-year membership prior to the expiration of its term. Testimony of J. Martinez; Exhibit G.

62. On April 21, 2003, Martinez wrote Goddard at DFI to summarize his activities in the prior year. Exhibit I. In Martinez' letter, he states, "We began offering rebates last year and only a small portion of customers have exercised this optional instant rebate." Also, Martinez' letter does not disclose a mailing address or that Martinez is the owner of Cash-Connects.Com. This letter merely identifies an e-mail address for the managing director of the business, but no return postal address. Exhibit I.

63. As Martinez' letter indicates, Cash-Connects.Com had been operating in Indiana for a year, but did not register his Nevada corporation with the Indiana Secretary of State until April 3, 2003. Exhibit C

64. The amount of the Early Termination Fee ("ETF") varies depending on the level of membership and the point during the membership at which the termination occurs. For a member terminating a one-year membership during the first four months, the ETF is equal to the amount of the rebate received by the member; the amount of the ETF is reduced after the fourth month of membership and again after eight months. Testimony of J. Martinez.

65. Members who have one of the earlier Membership Agreements requiring reimbursement of the full amount of the rebate may terminate by paying the ETF corresponding to their membership level under the current form of agreement, together with any accrued service fees or other charges due as specified in each member's agreement. *Id.*

66. Sue Murphy testified that Farren closed his business and sold some of Cash Quick's assets to Martinez from Fair Oaks Ranch, Texas because Indiana had enacted fees on payday loan businesses. When Martinez began operating Cash-Connects.Com at the former locations of Cash Quick, Murphy testified that she went to work for Martinez' company, Cash-Connects.Com, initially managing the business as a consultant, and later becoming employed as Cash-Connects.Com's General Manager; she earns \$2,900 bi-weekly which is \$75,400 per year. Cash-Connects.Com assumed most of the former retail locations of Cash Quick. At some locations, large Cash Quick signs remain in place in view of the Cash-Connects.Com storefronts. Exhibit E, 3701 Post Road, Indianapolis and 6805 E. 38th St., Indianapolis.

67. Murphy testified that payment plans or other forms of cooperative relief had been made available to members who raised concerns about their financial ability to pay

pursuant to the terms of their Membership Agreement. She also testified that the bulk of customer complaints she received from members occurred after the Attorney General had publicized its suit against Cash-Connects.Com as an illegal operation.

68. None of the consumers who complained to the Attorney General were made aware of mediation procedures available to them by that office. The Attorney General did not contact Cash-Connects.Com after Cash-Connects.Com responded to each of the consumer complaints that had been forwarded to it; nor did the Attorney General's Office attempt to initiate a mediation of the consumer disputes, as provided for by Ind. Code § 4-6-9-4.

69. Plaintiffs' Amended Complaint alleges that "virtually none" of Cash-Connects.Com's customers use the "Internet services" made available to them. Conclusive evidence was not presented to support this generalized allegation. There was testimony that Cash-Connects.Com had sold approximately 10,000 memberships through its retail sites in Indiana and had approximately 2,500 active members at the time of hearing.

70. At the hearing, Martinez also testified that virtually all of the Indiana customers have exercised the optional instant rebate, contrary to his statement in his letter of April 23, 2003 to Goddard. See paragraph 60.

71. Van Meter and Martinez both testified that they have not determined how many of their customers actually use Internet services through its website.

72. The Plaintiff argued that the services offered by Cash-Connects.Com's website are of dubious, if not, minimal value. Martinez testified that persons wishing to post a resume are posting it to the company's website that is available only to other members. Martinez admitted that there are similar free services available on any browser, such as

Hotmail at MSN.com. Cash-Connects.Com's site included the AOL city guide to Indianapolis. Martinez stated that the links to the Lovenet personals and the King Capper sports pics would cost consumers more if they were not a member of Cash-Connects.Com. However, Martinez did not present any evidence to support that assertion. Martinez acknowledged that tee time reservations at golf courses is a service available at any tourist website. Martinez stated that the Lovenet website, which he created, is now owned by his cousin.

73. Internet services from well-known providers such as Net Zero and AOL range from \$9.95 to \$23.90 per month and provide actual internet access. However, Cash-Connects.Com's mere website membership ranges from \$2 per day to \$20 per day, or \$60 to \$600 per month, and does not provide actual internet access.

74. The fee Cash-Connects.Com receives for its service is \$2 per day per \$100 rebate; this amounts to a fee of \$56 dollars bi-weekly for \$200 received by the consumer.

75. Until Martinez changed Cash-Connects.Com's marketing strategy from selling Internet website memberships only, to offering what he called a "rebate," his company had only 200 consumers in Indiana. In spite of the growth of his consumer base through offering rebates, Martinez was unable to document how many of his consumers actually use the Internet web page services through Cash-Connects.Com's website. Of the 10,000 contracts signed under this new marketing strategy, according to Martinez, only 2,500 remain in force. The Plaintiff concluded, and argued, that this four to one turn over in customers is evidence that the real purpose of this company is simply to provide what consumers seek when calling 357-CASH or when consumers are directed by the former

Cash Quick signs next to the Cash-Connects.Com banner over the door--- a short term loan rather than Internet services.

76. The DFI, through its division of consumer credit, is charged with the administration of the UCCC pursuant to Ind. Code § 24-4.5-6-103. Investigatory powers are granted under Ind. Code § 24-4.5-6-106, which provides that the DFI is empowered to “examine the books and records of persons and may make investigations of persons as may be necessary to determine compliance.” In addition, the DFI is authorized to “administer oaths or affirmations, subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter which is relevant to the investigation.”

77. The defense complained that there is no evidence that Cash-Connects.Com was given notice of any investigation of its operations, no meaningful opportunity to be heard prior to the DFI’s “determination” that its operation violated the Small Loan Statute, and no indication that the DFI was planning to seek to enjoin its operations in Indiana after operating its retail locations for more than six months without objection or comment from the DFI. Cash-Connects first became aware of the DFI’s position regarding its operations when the Attorney General issued its October 31, 2003 press release announcing the filing of this action, and naming Cash-Connects.Com as one of several “payday loan companies” the State alleged were operating illegally. Testimony of J. Martinez.

78. In addition, the Defendant complained that there was testimony that numerous telephone calls were made to Cash-Connects.Com locations after this action was commenced and were identified on “caller ID” as originating with the State of Indiana. In the course of these calls, Cash-Connects.Com employees were allegedly solicited to agree with the unnamed caller that the rebates available to Cash-Connects.Com’s members were,

in fact, “loans” or “payday loans.” These calls peaked during the month of November 2003—after this action had been filed on October 30—and in January of 2004, leading up to the date of the preliminary injunction hearing in February. Testimony of S. Murphy.

79. There was testimony that, following the Attorney General’s press release on October 31, 2003, announcing this action, Cash-Connects.Com received telephone calls from some of its members indicating that the Attorney General’s Office told them they did not have to make any further payments under their Membership Agreements and that Cash-Connects.Com is going to be put out of business in six weeks. *Id.*

80. The defense argued that Goddard testified that, in determining the effective interest rate the DFI alleges Cash-Connects.Com charges its members for the alleged “loans” to these members neither he nor, to his knowledge, anyone at DFI determined or assigned a value to the products or services included in Cash-Connects.Com memberships. There was no other evidence offered indicating that the DFI ever considered the value of Cash-Connects.Com’s products or services or its costs of operation, including license fees paid to content providers, or allocated any portion of the service fees paid by Cash-Connects.Com members to such amounts in its calculation of the alleged “costs” to consumers of the “loans” made to them.

81. Goddard was shown a promotional flyer for services offered by EarthLink, Inc., which the Court by judicial notice recognizes to be a national provider of Internet access services. The flyer promotes EarthLink’s dial-up Internet services and offers a “\$100 Instant Rebate” for consumers who sign a 12-month service contract at \$21.95 per month. The flyer also provides that a \$100 “early-termination fee” applies to the offer. Exhibit 2.

82. When queried by the defense about whether DFI was investigating EarthLink's rebate offer, Goddard replied, "not yet." Goddard's reply, as well as similar responses to queries regarding the DFI's possible investigation of cash rebates offered by major automobile makers and dealers, caused the defense to question Goddard's understanding of applicable state and federal consumer credit laws and questioned Goddard's objectivity in pursuing Cash-Connect.Com and other internet service providers in relation to Indiana's Small Loan Statute.

83. Ind. Code § 24-4.5-3-106 defines loan as follows:

"Loan" includes

- (1) the creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third party for the account of the debtor;
- (2) the creation of debt by a credit to an account with the lender upon which the debtor is entitled to draw immediately;
- (3) the creation of debt pursuant to a lender credit card or similar arrangement;
- and
- (4) the forbearance of debt arising from a loan.

84. Under the foregoing, a consumer loan made under Chapter 3 of the Indiana Uniform Consumer Credit Code has a 36% Annual Percentage Rate (APR) maximum interest charge on principal up to \$960.

85. Ind. Code § 24-4.5-7-104 defines small loans as follows:

"Small loan" means a loan:

- (a) with a principal loan amount that is more than fifty dollars (\$50) and less than four hundred one dollars (\$401); and
- (b) in which the lender holds the borrower's check under an agreement, either express or implied, for a specific period before the lender:
 - (i) offers the check for deposit or presentment; or
 - (ii) seeks authorization to transfer or withdraw funds from the borrower's account.

86. Under the foregoing, a finance charge on a Chapter 7 loan up to \$100 may

not exceed 15% of the principal; for amounts over \$100 but less than \$401, the loan may not exceed 10% of each additional \$100 principal, or a total of \$35 as outlined in Ind. Code § 24-4.5-7-201.

87. At the hearing, the Defendant admitted to, at least initially, some confusion as to the nature of Cash-Connects.Com's business practices among customers of the payday lender that previously operated Cash-Connects.Com's retail locations. Martinez testified that he felt badly for the seven consumers who had apparently misread or misunderstood their contractual obligations with the Defendant, but that the vast majority of his members understood his company's intent, "...to help people save money and make money" through Cash-Connects.Com's Internet services. Testimony of J. Martinez. The court remains to be convinced.

88. The court finds, after reviewing the evidence, testimony of witnesses and the arguments of counsel, that it is uncontroverted that to the seven consumers there was no mistake regarding their intentions to obtain a loan from the Defendant; they were misled into believing they were applying for and obtaining a short term loan, not Internet services, from the Defendant, Cash-Connects.Com. Despite the execution by the respective parties, namely the seven consumers and the Defendant, of Cash-Connects.Com's standardized Membership Agreement, there was no meeting of the minds between the parties regarding the identical terms and conditions of their contractual obligations.

89. Furthermore, the court is convinced of the same continuing confusion in the market place based upon Goddard's recent personal inquiries of the Defendant regarding a "loan". See paragraph 11. And further, upon the declaration, Exhibit D, of Theresa Hammon, an investigator for the Office of the Indiana Attorney General, regarding

Defendant's telephone message on February 10, 2004, a mere seven days prior to the Court's hearing. See paragraph 33.

90. The court finds that the Plaintiff has met their burden of proof by establishing by a preponderance of the evidence presented at the hearing of a prima facie case that the Defendant intentionally engaged in small loan transactions with the seven consumers which were designed to evade the statutory applicability of the Indiana Small Loan Act; and further, that said transactions were deceptive, unfair and fraudulent to the extent to warrant the granting of a preliminary injunction pending a final hearing; pending said final hearing, a determination of the extent, or lack thereof, of such transactions remains to be proven;

91. Said transactions are per se "irreparable harm" to the public;

92. The court distinguishes the example cited by the defense regarding Earthlink's rebate offer since said rebates are not offered in the identical physical location where certain consumers had heretofore obtained loans as well as certain consumers whose personal financial records were already accessible by Cash-Connect.Com based upon the payday loan records of Lone Star or Cash Quick; See paragraphs 81, 18, 29, 51 and 52.

93. The court finds that a preliminary injunction will preserve the rights of all parties for a later application of federal consumer credit act transactions and that the limited purpose of this Court's preliminary injunction is only to arrest potential mistaken consumer loans with Defendant's rebate marketing strategy, not the loss of sales of Internet access through Cash-Connect.Com;

94. The court notes that given the Court's findings above, the Defendant does not possess a license from the Indiana Department of Financial Institutions to operate a small loan or payday loan business;

95. The DFI investigation was sufficient for the limited purposes of this preliminary injunction particularly in light of the difficulty in obtaining factual information from the Defendant regarding ownership, a physical address of management, ability to communicate with management other than over the Internet and lack of available information regarding Defendant's business policies, standard operating procedures and practices.

96. Given the nature of the allegations and public policy concerns, further notice to the Defendant---other than asking its employees, managers and agent of record on the Articles of Incorporation and Indiana seller of leaseholds, business assets, customer lists and business reputation---may have proven to be detrimental to DFI's investigation.

97. Defendant is not absolutely entitled to judicial review of administrative remedies regarding a per se licensing statutory violation in advance of a limited preliminary injunction pending a final hearing.

98. Any delay in Plaintiff's initiating legal action while undertaking its investigation of Defendant, after receiving a letter from the Defendant which the Court finds to be less than candid, especially after Defendant has failed to register with the Indiana Secretary of State in a timely fashion after commencing business in Indiana as an out of state corporation, was reasonable under the circumstances.

99. While the Court agrees with the defense that Plaintiff failed to consider much if any value of Defendant's Internet services, including sums expended by the Defendant to

obtain access for its members, this preliminary injunction does not preclude the Defendant from continuing to sell its Internet product, pending a final hearing, but merely precludes the use of the marketing strategy utilizing rebates which have caused the confusion in the Indiana market place given the Defendant's intentional use of its predecessors' payday customer lists, signage and physical locations.

100. Freedom to contract includes a clear meeting of the minds regarding the terms and conditions of the parties' respective contractual obligations; misrepresentations, mistakes in business communications, and misleading omissions by one of the parties is enough to overcome the execution of a written instrument, drafted solely by the party contributing to said confusion, between the parties resulting in mutually mistaken terms and conditions of their contract.

101. Potential financial remuneration for losses suffered as the result of deceptive, unfair or fraudulent business transactions in direct violation of a statutory obligation is not an adequate remedy at law.

102. Any finding of fact may be deemed a conclusion of law and vice versa.

II. CONCLUSIONS OF LAW

103. A preliminary injunction is an extraordinary remedy that should be used sparingly. *Crossmann Communities, Inc. v. Dean*, 767 N.E.2d 1035, 1040 (Ind.Ct.App. 2002). Injunctive relief should not be granted except in rare circumstances in which the law and facts are clearly within the moving party's favor. *Id.*

104. The burden of proof is on the movant, in this case, the DFI and the Indiana Attorney General.

105. Indiana courts recognize the per se “irreparable harm” rule, which drops two prongs from the usual four-prong test used to determine whether a preliminary injunction should issue. *Union Township School Corporation v. State*, 706 N.E.2d 183 (Ind.Ct.App. 1998).

106. Invocation of the per se rule, however, is only proper when it is clear that a statute has been violated. *Id.* at 192.

107. The first task for the Court, then, is to determine if Plaintiffs have established a “clear” violation of a statute.

108. In this regard, the Court finds that the Small Loan Statute is a recent addition to Indiana’s UCCC, enacted by the legislature in 2002. Apparently, it has not been construed in any published decision of the Indiana appellate courts on the issues presented here.

109. On August 16, 2001, the Supreme Court of Indiana issued its opinion in *Livingston v. Fast Cash USA*, 753 N.E.2d 572 (Ind. 2001). This case held that “Payday loans” were limited to a 36 per cent interest rate (APR) for loans up to \$960. *Id.*, 753 N.E.2d at 577.

110. Following the *Livingston* decision, the Indiana General Assembly enacted the Small Loan Statute, which took effect on passage on March 14, 2002.

111. The Small Loan Statute, Ind. Code § 24-4.5-7-201(3), limits the total amount of finance charges to 15% for the first \$100, 10% for each additional \$100 in principal, up to a maximum charge of \$35.00.

112. The \$2 per day per \$100 of rebate/loan charged by Cash-Connects.Com to a

consumer amounts to an interest rate of 730% APR. This interest rate is usurious and illegal under the Small Loan Statute. When examining the usurious transactions, the Court looks through form to substance. The Small Loan Statute, Ind. Code § 24-4.5-7-102(1)(c) and 410(f), prohibits disguised loans or loan subterfuges.

113. The characterization of Cash-Connects.Com's transactions with consumers is an exaltation of form over substance; the self-styled rebate is a disguised loan or a loan subterfuge in violation of the Small Loan Statute.

114. The Small Loan Statute, Ind. Code § 24-4.5-7-404, limits the size of any small loan to less than \$401.

115. Loans in excess of \$400.99 are Consumer Loans regulated by the Uniform Consumer Credit Code with a maximum interest charge of 36% APR per Ind. Code § 24-4.5-3-508.

116. Ind. Code § 24-4.5-7-409(5) grants the Director the right of injunction against violations of the Small Loan Statute. There is no requirement that DFI must pursue administrative remedies against an entity that has avoided licensing requirements.

117. The remedies at law for the Plaintiffs are inadequate and cause irreparable harm pending resolution of the substantive action because Defendant's business is in violation of the Small Loan Statute and the consumers continue to be harmed by deceptive practices.

118. Where an action to be enjoined is unlawful, the unlawful act constitutes per se "irreparable harm" for the purposes of preliminary injunction analysis and no further showing is required. *Union Township School Corporation. v. State*, 706 N.E.2d 183, 189 (Ind. Ct. App. 1998). Operating without a required license is also per se irreparable harm.

National Salvage and Service, Corp. v. Comm'r, Ind. Dept. of Environmental Mgt., 571 N.E.2d 548, 558-559 (Ind. Ct. App. 1991); no further showing of balancing of harms or inadequate remedy at law need be shown. *Id.*

119. The Plaintiffs have at least a reasonable likelihood of success at trial and have established a prima facie case, because Defendant is operating without a license and charging fees in excess of those permitted by the Small Loan Statute and the IUCCC generally.

120. The issuance of a preliminary injunction will be in the public interest and outweighs any threatened injury to the Defendant because consumers are being subjected to a usurious interest rate; moreover, unlicensed payday loan companies are gaining a profit advantage over licensed companies which charge the legal interest rate. Failure to issue this preliminary injunction will provide incentive to licensed lenders to opt for this illegal business operation. Additionally, Defendant's harm is minimized in that it may continue to sell their Internet memberships absent the rebate.

121. Notwithstanding, the legal requirements for injunctive relief sought by the State of Indiana, the actual harm to the public should Cash-Connects.Com be allowed to continue to operate its deceptive and unlawful, and continue to mislead unsuspecting consumers will result in harm to the public that outweighs the potential harm to the unlicensed operation.

122. To obtain a preliminary injunction under Indiana law, the moving party has the burden of showing by a preponderance of the evidence that: (1) its remedies at law are inadequate, thus causing irreparable harm pending the resolution of the substantive action if the injunction does not issue; (2) it has at least a reasonable likelihood of success at trial

by establishing a prima facie case; (3) its threatened harm outweighs the threatened harm the grant of an injunction may inflict on the non-moving party; and (4) the public interest would not be disserved by the grant of the preliminary injunction. *Tilley v. Roberson*, 725 N.E.2d 150, 153-54, (Ind.Ct.App. 2000).

123. The law concerning contracts is well settled in Indiana. An offer, acceptance, plus consideration make up the basis for a contract. A mutual assent or a meeting of the minds on all essential elements or terms must exist in order to form a binding contract. *Homer and Homer v. J.M.Burman, d/b/a Burman Electric Service*, 743 N.E.2d 1144, (Ind.Ct.App. 2001).

124. The goal of contract interpretation is to give the effect to the parties' intent. Unless the contract provides otherwise, it is implied that the parties intend to comply with all applicable statutes and city ordinances in effect at the time of the contract. *Id.*

125. A valid contract requires that an offer be made and accepted, with a meeting of the minds by the contracting parties. For a meeting of the minds to exist, both parties must have the same intent. *Flynn, et al v. Aerchem, Inc. et al*, 102 F.Supp. 2d 1055, (U.S. Dist. 2000).

126. Although Indiana law presumes that a party has read and understood documents that he/she signs, this presumption can be overcome by evidence that the plaintiff requires or seeks assistance in understanding the terms of the agreement. *Geiger and Sadler v. Ryan's Family Steak Houses, Inc. et al*, 134 F. Supp. 2d 985, (U.S. Dist. 2001).

127. Indiana law recognizes that equitable principles exist which might require the court to refuse to recognize the provisions of a contract where there is allegation and proof

of fraud, misrepresentation, overreaching, undue influence, unjust enrichment, or undue advantage of one party over the other. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. *Id.*

128. A contract may be declared unconscionable if a great disparity in bargaining power leads the party with the lesser power to enter a contract unwillingly. In addition, the contract must be one that no sensible person not under delusion, duress or in distress would make, and one that no honest and fair person would accept. *Beaver and Beaver v. Grand Prix Karting Association, Inc.*, 246 F.3d 905, (U.S. Dist. 2001).

129. A contract will be deemed unconscionable when a great disparity in bargaining power exists which leads the weaker party to sign a contract unwillingly or without being aware of its terms. The contract must be such that no sensible man not under delusion, duress, or in distress would make, and such as no honest fair man would accept. *Sequa Coatings Corporation v. Northern Indiana Commuter Transportation District*, 796 N.E.2d 1216, (Ind.Ct.App. 2003).

130. Any conclusion of law may be deemed to be a finding of fact and vice versa.

III. ORDERS

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the Defendant, Cash-Connects.Com, Inc. shall immediately cease and desist from making or servicing any new or existing payday loans, small loans or other contracts which have used the guise of Internet service contract rebates unless and until it is licensed by the Indiana Department of Financial Institutions.

WHEREFORE IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, Cash-Connect.Com, Inc. shall cease and desist from entering into any

prospective contracts utilizing a rebate of any kind until licensed by the Indiana Department of Financial Institutions.

WHEREFORE IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pending a final hearing in this action, the Defendant, Cash-Connect.Com, Inc. shall make available for examination by the Indiana Department of Financial Institutions any and all contracts entered into with its consumers since first entering the State of Indiana market through the current time.

WHEREFORE IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties shall petition the Court for a final hearing on the merits of this action, or other interim hearings as needed, for the purpose of Court determination of all remaining issues.

SO ORDERED this 17th day of March, 2004.



DAVID L. WELCH, Judge
Monroe Circuit Court VI

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